

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Roy and Josie Fisher, et al.,
Plaintiffs,
v.
United States of America,
Plaintiff-Intervenor,
v.
Anita Lohr, et al.,
Defendants,
and
Sidney L. Sutton, et al.,
Defendants-Intervenors,

Maria Mendoza, et al.,
Plaintiffs,
United States of America,
Plaintiff-Intervenor,
v.
Tucson Unified School District No. One, et al.,
Defendants.

CV 74-90 TUC DCB
(lead case)

ORDER

CV 74-204 TUC DCB
(consolidated case)

1 The Court denies the Second Motion for Reconsideration of Intervention by the
2 State. The Court adopts the USP, pursuant to the parties' stipulations and pending
3 incorporation of the changes required by the rulings of the Court made herein to resolve the
4 disputed areas of the consent decree.

5 **A. Background**

6 On July 19, 2011, the Ninth Circuit Court of Appeals reversed and remanded this
7 Court's finding that the Tucson Unified School District (TUSD) had attained unitary status.
8 *Fisher v. Tucson Unified School District*, 652 F.3d 1131 (9th Cir. 2011). Since 1978, the
9 District had operated TUSD under a consent desegregation decree "designed to remedy past
10 discriminatory acts or policies." *Id.* at 1137. The 1978 desegregation settlement agreement,
11 like all such decrees, was a remedial plan necessary to ensure that the District which had
12 once operated TUSD as a state-compelled dual system performed its "affirmative duty to take
13 whatever steps might be necessary to convert to a unitary system in which racial
14 discrimination would be eliminated root and branch." *Id.* at 1134 (quoting *Green v. Cnty.*
15 *School Board of New Kent County, Virginia*, 391 U.S. 430, 437-38 (1968)).

16 This Court focused on the limited nature of the case, reflected in the 1978
17 Stipulation,¹ which identified very specific activities to be performed over five full school
18 years, and found that to the extent practicable the District had eliminated the vestiges of *de*
19 *jure* segregation.² In making this decision, this Court limited its *Green* analysis to factors
20 identified in the 1978 Stipulation, however, the Court could not ignore that the District had
21 operated the TUSD for over 25 years, pursuant to the 1978 Stipulation, and in this regard this
22 Court found the District had not acted in good faith because over those 25 years the District
23

24
25 ¹The Court refers to the 1978 consent decree as the 1978 Stipulation. The Court refers
26 to the consent decree being adopted now as the USP.

27 ²Latin for: "as a matter of law."
28

1 had not addressed ongoing segregation and discrimination in TUSD, both physical
2 segregation and unequal academic opportunities for Black and Hispanic minority students.

3 On review, the Ninth Circuit Court of Appeals held this Court's "findings were fatal
4 to its determination that the School District ha[d] achieved unitary status." *Id.* at 1141. The
5 appellate court explained this Court erred as a matter of law because "Supreme Court
6 precedent is clear: in making a declaration of unitary status and terminating federal
7 jurisdiction, a district court must determine that the School District has 'complied in good
8 faith with the desegregation decree since it was entered' and has eliminated 'the vestiges of
9 past discrimination . . . to the extent practicable.'" *Id.* (quoting *Missouri v. Jenkins*, 515 U.S.
10 70, 89 (1995)); see *Freeman v. Pitts*, 503 U.S. 467, 492 (1992); *Board of Education of*
11 *Oklahoma City Public Schools v. Dowell*, 498 U.S. 237, 249-50 (1991).

12 The court reversed and remanded the case, directing this Court to retain jurisdiction
13 "until it is satisfied that the School District has met its burden by *demonstrating*—not merely
14 promising—its 'good-faith compliance . . . with the [Settlement Agreement] over a reasonable
15 period of time.' [citation omitted] The court must also be convinced that the District has
16 eliminated 'the vestiges of past discrimination . . . to the extent practicable' with regard to
17 all of the *Green* factors. [citation omitted]" *Id.* at 1144 (emphasis added).

18 The *Green* factors direct the Court in regard to whether the District has eliminated
19 the vestiges of past discrimination to the extent practicable. The district courts "look not
20 only at student assignments, but 'to every facet of school operations—faculty, staff,
21 transportation, extra-curricular activities and facilities,'" *id.* at 1135-36; and other vital areas
22 of concern such as the quality of education being offered to white and black student
23 populations, *Freeman*, 503 U.S. at 473. The desegregation decree must address all these
24 components for the District's elementary and secondary school systems. *Id.* at 1136.
25 Notably, the *Green* factors may be related or interdependent such that a continuing violation
26 in one area may need to be addressed by remedies in another. *Id.*

1 Generally unitary status cannot be declared and jurisdiction cannot be terminated,
2 when a school district lags in one or more of the *Green* factors, *id.*, but in some cases
3 incremental or partial withdrawal of judicial control can be ordered for *Green* factors when
4 compliance is achieved. Granting partial withdrawal, including withdrawing supervision
5 over student assignments,³ is informed by whether there has been full and satisfactory
6 compliance in those aspects of the system where supervision is to be withdrawn; whether
7 retention of judicial control is necessary or practicable to achieve compliance with other
8 facets of the school system, and whether the District has demonstrated to the public and to
9 the parties and students of the once disfavored races and ethnicities its good faith
10 commitment to the whole of the agreement and to those provisions of the law and the
11 Constitution that were the predicate for judicial intervention. *Id.* at 1144-45.

12 The Mandate issued on August 10, 2011, and the Court issued its first order after
13 remand on September 14, 2011. At the suggestion of the Fisher Plaintiffs to appoint a
14 desegregation expert to guide the development and implementation of a desegregation plan,
15 the Court appointed a Special Master. (Order (Doc. 1350).) The Court set out the criteria
16 for the Special Master's Report, i.e., the Unitary Status Plan (USP), which included the
17 requirement that the USP contain a recommendation, supported by findings of law and fact
18 or stipulation of the parties, as to whether partial withdrawal of judicial oversight is
19 warranted for any *Green* factor. *Id.* at 4-5. "To expedite the resolution of this case," all
20 parties were directed to outline their positions regarding any *Green* factors which they
21
22

23 ³"The School District retains 'the burden of showing that any current imbalance is not
24 traceable, in a proximate way, to the prior violation.' *Freeman*, 503 U.S. at 494 . . . But 'as
25 the *de jure* violation becomes more remote in time and ... demographic changes intervene,
26 it becomes less likely that a current racial imbalance in a school district is a vestige of the
27 prior *de jure* system.' *Id.* at 496 . . . Still, good faith remains paramount: 'The causal link
between current conditions and the prior violation is even more attenuated if the school
district has demonstrated its good faith.' *Id.*" *Fisher*, 652 F.3d at 1144 n. 30.

1 believed are not at issue in this case and/or where partial withdrawal of judicial oversight is
2 appropriate. *Id.* at 6.

3 In the end, the parties prepared the USP by stipulation and submitted it to the Court
4 for its consideration and adoption for implementation in the TUSD. In other words, the
5 parties have stipulated to a “new” consent decree to ensure that the District, which once
6 operated the TUSD as a state-compelled dual system performs its affirmative duty to take
7 whatever steps might be necessary to convert to a unitary system in which racial
8 discrimination will be eliminated root and branch. On November 9, 2012, the stipulated Joint
9 Proposed Unitary Status Plan was filed, with specific notations regarding the areas of party
10 disagreement. The parties each filed separate briefs pertaining to their objections.

11 The Joint Proposed USP was made available to the State of Arizona, which appears
12 by *amici* in respect to the sole question of whether the USP may include a provision allowing
13 the return of the discontinued Mexican-American Studies (MAS) courses. January 10, 2012,
14 the TUSD Governing Board adopted a resolution suspending all MAS courses and teaching
15 activities after the Arizona Superintendent of Education John Huppenthal issued a Notice of
16 Violation on June 15, 2011, finding that MAS classes being offered at TUSD violated A.R.S.
17 § 15-112(A)(2)-(A)(4) because “TUSD presented material ‘in a biased, political, and
18 emotionally charged manner’ that promoted social and political activism against ‘white
19 people,’ promoted racial resentment, and advocated ethnic solidarity instead of treating
20 pupils as individuals.” (Arizona’s Objection (Doc. 1409) at 2 (quoting *In the Matter of the*
21 *Hearings of an Appeal by Tucson Unified School District*, No. 11F-002-ADE, citing *see*
22 *Case No. 4: 10-CV-00623-AWT* (Doc. 132-1) at 35)). The decision subjected the District
23 to having 10% of the District’s allocation of state funding withheld by the State, retroactive
24 to August 15, 2011. The District appealed, but the violation was affirmed by an
25 Administrative Law Judge on December 27, 2011. The State of Arizona has filed an
26
27
28

1 objection to the Joint Proposed Unitary Status Plan. It has also filed a Motion for
2 Reconsideration (Doc. 1418) of this Court's denial of its Motion to intervene in this case.

3 The Joint Proposed USP was made available to the public for review and public
4 comment. Three public hearings were held on Monday, November 26, 2012, at Tucson High
5 Magnet School; Tuesday, November 27, 2012, at El Pueblo Regional Center, and
6 Wednesday, November 28, 2012, at Palo Verde High School in the evenings from 6 pm to
7 8:30 pm.⁴ The notices for the public hearings were distributed to the community by press
8 releases and public service announcements. The Notices and the Joint Proposed USP were
9 also posted by the Court on the internet web site for the United States District Court for the
10 District of Arizona under "What's New?" and the tab "Cases of Interest." The Court website
11 directed the public to www.TucsonUSP.com where the Joint Proposed USP and public
12 notices were available in English and Spanish, and where public comments could be made
13 on line. Copies of the proposed USP were available in all schools and provisions were made
14 for comments to be made at these locations. All public comments were able to be made
15 anonymously. All in all, the Court is satisfied that there was a robust public comment period
16 where over 600 public comments were heard by the Special Master, written comments were
17 redacted to retain anonymity, copied and sent to the parties, and have been summarily
18 reported to the Court.⁵

21 ⁴The public notices in English and Spanish shall be filed into the record as an
22 attachment to this Order.

23 ⁵See also: (Doc. 1429: Public Comment; Doc. 1428: Petition; Doc. 1427: Letter
24 1/4/2013; Doc. 1426: Public Comment; Doc. 1422: Letter 1/11/2013 and
25 <http://www.examiner.com> article); Doc. 1417: Letter 12/18/2012 and excerpts of various
26 MAS course readings). These public comments were copied by the Court to the Special
27 Master to afford him an opportunity to bring any new concern, not previously considered
during the drafting of the USP, to the attention of the Court. Plaintiffs represented by
counsel must submit filings with the Court through their attorneys. LR Civ. 83.3(c).

1 Subsequent to the public comment period and further discussion by the parties,
2 some changes were made and on December 10, 2012, the parties filed the “final” Joint
3 Proposed Unitary Status Plan, which again noted areas of party disagreement. Again, the
4 parties each filed separate briefs regarding their objections. The State of Arizona has filed
5 an *amici* brief. The Special Master has provided the Court with his report and
6 recommendations regarding the areas of disagreement. The Court finds that all areas of
7 disagreement have been fully briefed. The Court, therefore, makes specific findings
8 regarding the areas of disagreement and adopts the stipulated USP, so revised.

9 The Court begins with an acknowledgment of the hard work that has gone into
10 crafting what is a very comprehensive plan to attain unitary status in the TUSD over the next
11 four school years. There are clearly more areas of agreement than disagreement, and the
12 Court commends the Special Master for his facilitation in this matter. The Court is
13 convinced that the Joint Proposed USP sets out steps to convert the TUSD to a unitary
14 system in which racial discrimination will be eliminated root and branch to the extent
15 practicable. The question remains whether at the end of the approximate four year period of
16 operation under this consent decree, the USP, the District will have complied in good faith
17 with its terms.

18 **B. The Green Factors.**

19 The Court finds that the proposed USP addresses every *Green* factor: student
20 assignment, transportation, administrative and certified staffing, extracurricular activities,
21 and facilities, plus quality of education, family and community engagement, technology, and
22 discipline. Nevertheless, the District enters into the consent decree with the caveat that: “[i]t
23 does not constitute an admission by the District that there are vestiges of segregation that
24 remain in the District or that the obligations set forth herein are required to eliminate any
25 such vestiges that may exist.” (District Objection (Doc. 1407) at 24.) “Instead it represents
26 an agreement that, if the District implements the [] USP for the period of time set forth
27
28

1 therein, it will have eliminated any vestiges that may exist and that it will achieve unitary
2 status at the end of that time period.” *Id.* While the Court agrees with the latter statement,
3 it does not agree with the former.

4 The District argues that while it stipulates to these provisions being in the USP, they
5 are not required to remedy any constitutional violations found to exist in TUSD. According
6 to the District, the only findings of fact and conclusions of law establishing the constitutional
7 violation at issue in this case were those dated June 4, 1978. The District argues that even
8 the 1978 Stipulation was unsupported by findings of fact linking it to any constitutional
9 violation. This is an old argument seen and rejected by this Court in 2006, when this Court
10 issued the Order defining the scope of the unitary status proceeding it was then undertaking.
11 (Order (Doc. 1119), 2/7/2006, at 4.) Again, this Court finds for the record that Judge Frey’s
12 findings of fact and conclusions of law fully supported the remedial measures set out in the
13 1978 Stipulation.

14 The Ninth Circuit’s ruling on July 19, 2011, established unequivocally that the
15 District has not attained unitary status. Relying on the findings of fact made by this Court,
16 Order filed 8/21/2008 (Doc. 1239) and Order filed 4/24/2008 (Doc. 1270), the Ninth Circuit
17 reversed this Court’s finding that unitary status was attained and found the contrary because:
18 the “District failed the good faith inquiry *and* [this Court’s findings] raised significant
19 questions as to whether the District had eliminated the vestiges of racial discrimination to the
20 extent practicable . . .” (Mendoza Response Objection (Doc. 1413) at 1 (citing *Fisher*, 652
21 F.3d at 1140) (emphasis in original).

22 In October 2011, the parties provided briefs concerning their positions as to whether
23 partial withdrawal of judicial review was appropriate in this case. The District took the
24 position that it is appropriate to withdraw oversight regarding three *Green* factors: facilities,
25 extra-curricular activities, and transportation, except as it relates to student assignment. The
26 District focused on these three factors because they were not included in the original 1978
27
28

1 Stipulation as areas requiring a constitutional remedy. (TUSD Memo (Doc. 1332) at 2.)

2 The Plaintiff-intervenors correctly noted that this Court “has repeatedly held the
3 District has failed to eliminate the vestiges of past discrimination with respect to student
4 assignment, faculty assignment and hiring, transportation and facilities. (P-Intervenor Memo
5 (Doc. 1337) at 5) (citing 2008 Orders and 2006 Order (Doc. 1119). As noted by the
6 Plaintiffs Mendoza, it would be error for the Court to adopt the District’s assertion that
7 certain *Green* factors are not at issue in this case now because they were not at issue in 1978.
8 (Mendoza Memo (Doc. 1330) at 2-3, n.4), *see also* (Fisher Memo (Doc. 1328) at Table 1:
9 Factors relevant to unitary status determination identified by supporting authority).

10 Given the express directive of the court of appeals that this Court, upon remand,
11 shall consider all of the *Green* factors, including quality of education, *Fisher*, 652 F.3d at
12 1144, this Court finds them all at issue now. The Plaintiffs do not have to establish that
13 vestiges of discrimination remain for every *Green* factor to warrant redress. The burden is
14 on the Defendant to establish that the vestiges of discrimination resulting from the prior dual
15 school system have been eradicated to the extent practicable. *Freeman*, 503 U.S. at 494.
16 Accordingly, until unitary status is attained, the District has the burden of proving that racial
17 imbalances and inequities within the school system are not related proximately to the prior
18 violation. *Id.*

19 At this point in the game, it is a two-pronged related inquiry: 1) whether the District
20 has complied in good faith with the desegregation decree since it was entered, and 2) whether
21 the District has eliminated the vestiges of the past discrimination that was the subject of the
22 action to the extent practicable. Especially, in this case where the span of time for analysis
23 is approximately 35 years, whether the vestiges of the past discrimination identified in 1978
24 have been eliminated to the extent practicable hinges in large part on whether the District
25 complied in good faith with the remedial plan set out in the 1978 Stipulation. This question
26 has been unequivocally answered in the negative. On remand, no further findings of fact
27
28

1 regarding constitutional violations are necessary to warrant the imposition by this Court of
2 an updated plan to attain unitary status.

3 This brings the Court to the next question of whether any *Green* factor may be
4 omitted from the USP, i.e., whether there should be partial withdrawal of judicial control for
5 any *Green* factor. First, the Court notes that the parties' own stipulated plan to attain unitary
6 status addresses all the *Green* factors, including provisions aimed at improving quality of
7 education. The proposed USP is a comprehensive plan drafted with the assistance of a
8 Special Master,⁶ counsel for all parties, the Plaintiff-intervenor (the United States Department
9 of Justice, Civil Rights Division), and several experts⁷ including District staff. Second, the
10 Court notes that the District has not moved for partial withdrawal and has not objected to the
11 inclusion of provisions related to transportation, extra-curricular activities, and facilities—the
12 three areas where it asserts it has attained unitary status. The Court finds that the *Green*
13 factors addressed in the proposed USP are interrelated and interdependent, forming a
14 comprehensive plan such that partial withdrawal of judicial oversight as to any *Green* factor
15 is inappropriate.

16
17
18 ⁶Willis Hawley is Professor Emeritus of Education and Public Policy at the University
19 of Maryland and Director of the Teaching Diverse Students Initiative, a project of the
20 Southern Poverty Law Center.

21 ⁷Gary Orfield is Professor of Education, Law, Political Science and Urban Planning
22 and Co-Director of the Civil Rights Project at the University of California at Los Angeles.
Orfield was Special Master in the San Francisco and St. Louis school desegregation cases.

23 Leonard Stevens is a consultant on equity issues and desegregation working with
urban districts. He served as Special Master in the Cincinnati, Ohio desegregation case.

24 Carlos A. Gonzalez is an attorney in Atlanta with expertise in mediation. He has
served as Special Master in desegregation cases involving higher education.

25 Beatriz Arias is Associate Professor of Bilingual Education at Arizona State
26 University and a Vice-President of the Center for Applied Linguistics in Washington, DC.
She has served as Special Master in the San Jose (CA) school desegregation suit.

Furthermore, the Court finds that supervision may not be withdrawn over any *Green* factor because at this point in time the Court cannot find full and satisfactory compliance in these areas. As evidenced by their inclusion in the proposed USP, there is room for improvement as to all *Green* factors. The Court finds that supervision may not be partially withdrawn for any *Green* factor because the USP is a comprehensive interrelated and interdependent plan and, therefore, judicial control over all *Green* factors is necessary and practicable to achieve compliance with all facets of the school system. The Court finds that supervision may not be partially withdrawn for any *Green* factor because the District failed to demonstrate to the public and to the parties and students of the once disfavored races and ethnicities its good faith commitment to the whole of the 1987 Stipulation and to those provisions of the law and the Constitution that were the predicate for judicial intervention.

C. Arizona's Motion to Reconsider Intervention and Objection to USP

There has been no significant change in circumstances to warrant reconsideration. There is no manifest injustice caused by this Court's denial of intervention.

The State of Arizona submits there is a significant change in circumstances because the District has withdrawn its objection to including the MAS program in the USP, and if the Court reinstates MAS courses, it is unable to appeal the decision unless it is a party-intervenor.

Undisputably, there is one significant difference since the Court ruled to deny intervention by the State of Arizona. The USP has now been drafted by stipulation of the parties. Section V, Quality of Education, includes subsections as follows: A) Access to and Support in Advanced Learning Experience, B) OELAS Extension, C) Dual Language Programs, D) Student Engagement and Support, E) Maintaining Inclusive School Environments, and F) Reporting.

a. Subsection D, Student Engagement: Culturally Relevant Courses

The purpose of subsection D, Student Engagement and Support, is to improve the academic achievement and educational outcomes of the District's African American and Latino students, using strategies aimed at closing the achievement gap and eliminating the racial and ethnic disparities for these students in academic achievement, dropout and retention rates, discipline, access to advanced learning experiences, and any other areas where disparities and potential for improvement exists. The proposed USP calls for six transformative strategies designed to change the educational expectations of and for African American and Latino students. The strategies engage these students in the academic curriculum by adopting culturally responsive teaching methods that encourage and strengthen their participation and success and provide necessary student support services to allow them to improve their educational outcomes. (Proposed USP (Doc. 1411) § V(D)(1).)

Subsection D includes the following strategies: Academic and Behavioral Supports Assessment and Plan, Dropout Prevention and Retention Plan, Personnel and Professional Development, Engaging Latino and African American Students, and Services to Support African American and Latino Student Achievement. (Proposed USP (Doc. 1411) at V(D)(2)-(7).)

The State objects to subsection D(6), Engaging Latino and African American Students, only as to the Latino students.

The District shall continue to develop and implement a multicultural curriculum for District courses which integrates racially and ethnically diverse perspectives and experiences. The multicultural curriculum shall provide students with a range of opportunities to conduct research and improve critical thinking and learning skills, create a positive and inclusive climate in classes and schools that builds respect and understanding among students from different racial and ethnic backgrounds, and promote and develop a sense of civic responsibility among all students. All courses shall be developed using the District's curricular review process and shall meet District and state standards for academic rigor. The courses shall be offered commencing in the 2013-2014 school year.

Id. at (6)(i).

1 By the beginning of the 2013-2014 school year, the District shall develop
2 and implement culturally relevant courses of instruction designed to reflect
3 the history, experiences, and culture of African American and Mexican
4 American communities. Such courses of instruction for core English and
5 Social Studies credit shall be developed and offered at all feasible grade
6 levels in all high schools across the District, subject to the District's
7 minimum enrollment guidelines. All courses shall be developed using the
8 District's curricular review process and shall meet District and state
standards for academic rigor. The core curriculum described in this section
shall be offered commencing in the fall term of the 2013-2014 school year.
The District shall pilot the expansion of courses designed to reflect the
history, experiences, and culture of African American and Mexican
American communities to sixth through eighth graders in the 2014-2015
school year, and shall explore similar expansions throughout the K-12
curriculum in the 2015-2016 school year.

9 *Id.* at (6)(ii).

10 In withdrawing its objection to these courses being developed as core courses, the
11 District clarifies that the Governing Board passed a motion on January 8, 2013, "Designating
12 a course as a core course means that passing the course will satisfy requirements for
13 graduation. It does not mean that all students must take the course; culturally relevant
14 courses will remain optional." (Notice of Withdrawal of Objection (Doc. 1421), Ex. A:
15 Agenda Item 9.)

16 The Court notes that the State's objection is not substantive in respect to subsection
17 (i), which provides for the development of multicultural curriculum to integrate racially and
18 ethnically diverse perspectives into standard core courses taught to all students, such as social
19 studies or English. The State's challenge is aimed at subsection (ii), which provides for the
20 development of culturally relevant courses. The State treats this provision as calling for
21 reinstatement of MAS courses which were terminated pursuant to the State's decision that
22 they violated A.R.S. § 15-112. Since then, no MAS courses are being offered in TUSD. The
23 first step called for in the proposed USP is course development. Only then will the State be
24 in any position to determine whether the culturally relevant courses, developed pursuant to
25 the USP, violate state law.

1 **b. MAS Courses**

2 Arizona law, A.R.S. § 15-112, provides: “A school district or charter school in this
3 state shall not include in its program of instruction any courses or classes that include any of
4 the following:

- 5 1. Promote the overthrow of the United States government;
6 2. Promote resentment toward a race or class of people;
7 3. Are designed primarily for pupils of a particular ethnic group, and
8 4. Advocate ethnic solidarity instead of the treatment of pupils as individuals.

9 The Court considers the State’s objections to the USP proposed by the parties, §
10 V(D)(6). The State argues that if the Court adopts this section “there is a real possibility that
11 the supporters of the illegal, biased, political, and emotionally charged MAS program that
12 promoted social and political activism against ‘white people’ and fomented racial resentment,
13 will have used a federal court-sanctioned avenue to resurrect this illegal course of
14 instruction.” (State Response Objection (Doc. 1414) at 2.) The State asks the Court to
15 disregard the several hundred comments from members of the general community that MAS
16 courses have merit as “mere solicitations by advocates for the illegal MAS program.” *Id.*
17 The State believes that the likely result of the USP will be another program that is as
18 “racismized” as the prior MAS program. *Id.*

19 The Court finds that the MAS courses, which were terminated subsequent to the
20 administrative decision issued by the State that they violated A.R.S. § 15-112, are not at issue
21 in this case. They have been discontinued. The culturally relevant courses called for in the
22 USP shall be designed to reflect the history, experiences, and culture of African American
23 and Mexican American communities and will have to be approved through the District’s
24 normal curriculum review process, including approval by the TUSD Governing Board, and
25 evaluated to ensure they align with state curriculum standards before being offered in TUSD.

1 (Proposed USP (Doc. 1411) § V(D)(6)(a)(ii); (SM Recommendation, SM USP, Addendum
2 A at 61.)

3 The State does not dispute the merits of culturally relevant courses to improve
4 academic achievement for minority students. The Special Master reports that two studies of
5 the MAS courses have been conducted. The first, the Cambium Report, commissioned by
6 the State in 2011, found the courses to be rigorous and that students were held to high
7 standards of performance. (SM Recommendation, SM USP, Addendum A at 61.) The
8 second study was commissioned by the Special Master and conducted *pro bono* by experts
9 from the University of Arizona: the Carbrera study. The Special Master concluded that both
10 studies suggest that students who took the MAS courses were more likely to graduate from
11 high school on time and to pass state achievement tests than similarly situated peers. *Id.*
12 Some have challenged these studies as “weak,” for various reasons, (Doc. 1429: Stegeman
13 letter), but they are at least some evidence supporting the proposed culturally relevant
14 courses.

15 Other studies and a substantial body of research by sociologists and psychologists
16 show that ““strengthening pride in one’s race and ethnicity, particularly for disadvantaged
17 groups, is related to positive intergroup attitudes as well as to academic achievement.”” (SM
18 Recommendation, SM USP, Addendum A at 62 (citing Melanie Killen, Professor of
19 Educational Psychology and Psychology at the University of Maryland and a Fellow of both
20 the American Psychological Association and the Association for Psychological Science)).
21 The Special Master explains that people who understand how discrimination has undermined
22 their opportunities are less likely to discriminate against others and “can dismiss negative
23 stereotypes as constraints on their own success.” *Id.* at 62-63.

24 The Court believes that including culturally relevant courses in the USP affords the
25 parties an opportunity to continue to study the affects of these types of classes on student
26 achievement. The Court urges the parties, the District, including the TUSD Governing
27
28

1 Board, to work together to identify study criteria that will make the next round of reports
2 more meaningful and more determinative. Based on the evidence before it at this time, the
3 Court finds that the evidence which does exist supports including culturally relevant courses
4 in the USP as one way to improve student achievement.

5 The State does not appear to argue any and all culturally relevant courses will
6 necessarily violate A.R.S. § 15-112 because it does not object to culturally relevant courses
7 for African American students. (Proposed USP (Doc. 1411) § V(6).) Instead, the State
8 argues that the MAS courses segregated students by race and were designed only for
9 Mexican American pupils. The State implies that the MAS courses were so hostile towards
10 “white people” that only Mexican American students would enroll in them. Again, the Court
11 declines to address the constitutionality of either the statute, its interpretation, or its
12 implementation to preclude such courses. That case is before the Honorable A. Wallace
13 Tashima, *Acosta et al. v. Huppenthal et al.*, CV 10-623 TUC AWT.

14 The State, like the Plaintiffs, must set aside what has occurred in TUSD in the past
15 and assume, as does this Court, that the USP will be implemented in good faith by the
16 District. The State is free to monitor the development of the culturally relevant courses and
17 their implementation. The State is free to enforce its laws as it did in 2011 when it took
18 action against TUSD for the MAS courses, if it believes any culturally relevant courses
19 developed and implemented in TUSD violate state law.

20 The Court does not exceed its authority by approving and adopting the USP,
21 containing curricular provisions, (United States (DOJ) Response Objection (Doc. 1416) at
22 3-5) (citations omitted). By adopting the USP § V(6), this Court is not approving nor
23 adopting any specific culturally relevant course. This Court’s ruling does not override State
24 law, and even if it did– the Supreme Court has held that state laws cannot be allowed to
25 impede a desegregation order. *See e.g., N.C. Bd. of Educ. v. Swann*, 402 U.S. 43, 45 (1971)

1 (if state law operates to inhibit or obstruct the operation of a unitary school or impede the
2 disbanding of a dual school system, it must fall).

3 The Court reaffirms its decision to deny the intervention of the State of Arizona in
4 this action. The State has not satisfied the criteria for intervention as a right. Federal Rule
5 Civil Procedure 24(a)(2) provides for intervention of right when the applicant establishes the
6 following: 1) the intervention is timely; 2) the applicant's interest relates to the property or
7 transaction involved in the pending law suit; 3) disposition of the lawsuit may adversely
8 affect the applicant's interest unless intervention is allowed, and 4) the existing parties do not
9 adequately represent the would-be intervenor's interest.

10 While the request is timely in respect to the State's ability to affect the terms and
11 provisions contained in the USP, the Court finds there is no issue ripe for resolution until the
12 culturally relevant courses are developed. Intervention is not necessary for the State to
13 enforce its laws. The State's ability to withhold 10% of state funding from TUSD is a
14 powerful weapon at the State's disposal to ensure that TUSD complies with state law. The
15 Court finds that the District has adequately represented the State's interest in enforcing
16 A.R.S. § 15-112. In the face of strong public support from members of its community for
17 MAS courses, the Governing Board voluntarily terminated the MAS courses, subsequent to
18 the decision by the State that they violated state law. The District chose to comply with
19 directives from the State rather than the Post Unitary Status Plan, a federal court order.
20 Finally, the Court finds that the State's interest relates to the USP in only a small way.
21 Culturally relevant courses are one strategy aimed at only one *Green* factor: student
22 achievement. While the MAS courses are a weather vein for controversy in the community,
23 including the culturally relevant courses in the proposed USP was not. All the parties
24 stipulated to including culturally relevant courses in the curriculum as a meritorious strategy,
25 fully supported by the experts and the Special Master, to improve the academic performance
26 of minority students. The Court denies the State's request to intervene as a right.

1 The Court also denies permissive intervention, pursuant to subsection 1 of Rule
2 24(b), which the Court may grant at its discretion if: 1) there is an independent ground for
3 jurisdiction; 2) the application is timely, and 3) there is a common question of law and fact
4 between the State's claim and the main action. In exercising discretionary intervention, the
5 Court must consider "whether the intervention will unduly delay or prejudice the
6 adjudication of the original parties rights." Fed. R. Civ. P. 24(b)(3).

7 As this Court held on June 14, 2012, when it denied the State's Motion to Intervene:
8 "Importantly, intervention by the State in this one issue will unduly delay and prejudice the
9 adjudication of the rights of the existing parties who have waited over 30 years for the
10 formulation of a comprehensive plan to eliminate, 'root and branch,' the vestiges of the
11 segregation that occurred in the TUSD four decades ago by bringing equal educational
12 opportunities to minority students in the TUSD." (Order (Doc. 1375) at 6.)

13 The Court concludes that there has been no significant change in circumstances to
14 warrant reconsideration of the intervention question. There is no manifest injustice caused
15 by this Court's denial of intervention. Furthermore, the Court believes that the State's
16 appearance by *amici* may also be concluded. The State shall show good cause why its status
17 as *amici* should not be ended now that it has had an opportunity to present its objections to
18 including culturally relevant courses in the USP. The State should show cause why the
19 normal avenues available to it to enforce its laws are not sufficient means by which it may
20 protect its interests here.

21 **D. Objections to USP: Consent Decree**

22 As previously noted, in large part the parties stipulated to the provisions included in
23 the Jointly Proposed USP. Since filing the USP, the parties have agreed that to allow for
24 flexibility in certain deadlines, language should be added to § I(D) as follows:

25 The Parties and the Special Master shall review all of the deadlines for
26 hiring/assignment and professional development and, to the extent
27 appropriate, revise these deadlines to ensure the recruitment and
28 hiring/assignment of the best qualified candidates, and the involvement of

1 the newly hired/assigned employees in the creation of professional
2 development plans. If the Parties and the Special Master cannot agree on
3 revised time lines, the dispute shall be presented to the Court as set forth in
4 Section I(D)(1).

(District Response Objection (Doc. 1412) at 3-4.)

5 The Court has considered the initial proposed USP, with noted objections (Doc.
6 1406) and Memoranda of Objections by the District (Doc. 1407), the Mendoza Plaintiffs
7 (Doc. 1408), and the State of Arizona (Doc. 1409); the final proposed USP, filed subsequent
8 to public comments⁸ (Doc. 1411) and final Response Objections by TUSD (Doc. 1412),
9 Mendoza Plaintiffs (Doc. 1413), Fisher Plaintiffs (Doc. 1415), the United States (Doc. 1406),
10 the State (Doc. 1414) and the State's Second Motion for Reconsideration of Intervention to
11 the extent it addressed the merits of the culturally relevant courses proposed in the USP (Doc.
12 1418); the Special Master's recommendations made to the Court on December 22, 2012, the
13 parties' responses to those recommendations and the Special Master's replies.⁹

14 In an effort to rule expeditiously to adopt the USP so as to not jeopardize deadlines
15 in the USP, which are fast approaching, the Court does not discuss every argument related
16 to every objection, except where necessary to note those rejected or to resolve a disputed area
17 of the consent decree. The parties did an excellent job of presenting their arguments. The
18
19

20
21 ⁸See n. 5.

22 ⁹The Special Master placed his recommendations in the side margins of the proposed
23 USP adjacent to each objection and attached the annotated USP, plus three addendums to a
24 cover letter which he addressed to this Court on December 22, 2012. The Court shall direct
25 the Clerk of the Court to file these documents as the Special Master's Recommendation,
26 simultaneously with the filing of this Order. The parties sent responses regarding these
27 recommendations to the Special Master and this Court. He replied and provided both to the
28 Court. These documents shall be filed into the record as: Special Master Recommendation,
Attachments USP Special Master Comments, addendums 1-3, and parties' Responses/Special
Master Replies.

1 Court has identified each objection which needs to be resolved and ruled expressly to resolve
2 each objection.¹⁰

3 The Court turns to the areas in the USP where there were objections: § II Student
4 Assignment; § IV Administrators and Certified Staff; § V Quality of Education; § VI
5 Discipline; § VIII Extracurricular Activities, and § X Accountability and Transparency.

6 **a. § II: Student Assignment**

7 Without making a formal objection to § II(C)(1) and (2), Student Assignment
8 Personnel: Director of Student Assignment and Magnet Strategy and Operations, the Fisher
9 Plaintiffs note that the USP potentially establishes approximately twenty new administrative
10 positions and asks that administrative positions created, staffed and funded under the USP
11 should be integral to the desegregation process and supplement rather than supplant already
12 existing positions. The Fisher Plaintiffs suggest certain reporting criteria which would assist
13 in tracking the link between staff, responsibilities, and funding sources. The Court directs
14 the Special Master to consider the suggestions made by the Fisher Plaintiffs as he moves
15 forward with developing the financial plan for the USP. (Fisher Objection (Doc. 1415) at
16 5.)

17 **Comment [A1] and [A2]¹¹:Fisher Plaintiffs Request for specific goals to be**
18 **established in the USP.**

19 The Fisher Plaintiffs object to § II(E)(3) and (4), Magnet Programs: Magnet School
20 Plan, and argue that this section should set more frequent and specific goals for the magnet
21 school evaluation process. In response to their concerns, the Special Master explains that the
22 USP embodies what organization psychologists call the expectancy theory of motivation.

23
24 ¹⁰The Special Master notes a typo at § II(E)(2), (SM Recommendation, USP SM
25 Comment [A1]), which should be corrected in the USP.

26 ¹¹These Comment numbers are from the proposed USP attached as Exhibit A to the
27 Stipulation of the Parties Regarding the Filing of the Joint Proposed Unitary Status Plan
28 Noting Areas of Party Disagreement (Proposed USP (Doc. 1411).)

1 It calls for those responsible for a given action, usually the District, to develop goals for each
2 different situation, make those goals public, and evaluate whether the goals are achieved.
3 If not, the District is expected to identify necessary program or personnel changes or
4 improvements. (Special Master’s (SM) Recommendation at iii.) Should the District fail
5 over the coming year to develop goals acceptable to the Fisher Plaintiffs, they are encouraged
6 to raise their concerns with the Special Master or this Court.

7 Specifically in response to the Fisher Plaintiffs’ request for a goal to be set related
8 to the Magnet School Plan, the Special Master proposes adding additional language in ¶ 3,
9 as follows: “and, (v) identify goals to achieve the integration of each magnet school which
10 shall be used to assess the effectiveness of efforts to enhance integration.” The Special
11 Master explains that this language is not duplicative of and is consistent with other goal
12 oriented language found in other areas of the USP. He believes the USP should contain
13 explicit language about setting goals for each school and addressing the expectation of
14 annual assessments of progress in attaining those goals. This allows individual schools to
15 assess their progress, and the Court notes that the language will enable the District, as well,
16 to make such individualized assessments. (SM Recommendation at iii, USP SM Comments
17 [A3][A4] at 9-10); SM Reply to TUSD, Mendoza, and DOJ Response to Recommendation.)
18 The Special Master recommends that the language, “to the extent practicable,” in paragraph
19 4 be retained. (SM Recommendation, USP SM Comment [A6] at 10.) The Court adopts this
20 recommendation and the recommended language for ¶ 3(v).

21 The Special Master also recommends changing the date “2015-2016” in § II(E)(5)
22 through which the District is obligated to apply for Federal Magnet School Funding to
23 “2016-2017,” which coincides with the date for attaining unitary status in § X of the USP.
24 *Id.* SM Comment [A7] at 10. The Court adopts this recommendation.

Comment [A3]:District objects to 50 % criteria for Magnet School Plan.

Subsection G, Application and Selection Process for Magnet Schools and Programs and for Open Enrollment, addresses oversubscribed schools and requires “the District [] as part of the Magnet School Plan to develop an admissions process – i.e., weighted lottery, admission priorities, which takes account of [certain specified] criteria,”(Proposed USP (Doc. 1411) § II(G)(2)(a) including students residing within a designated preference area. The proposed USP specifies: “No more than 50% of the seats available shall be provided on this basis.” *Id.* The District objects to the 50% limitation as too limiting and argues that while it may work in some magnet schools it could hamper the District’s flexibility in creating and implementing the Magnet School Plan. (District Objection (doc. 1407) at 11.)

All the Plaintiffs and the Special Master support the 50% criteria. The Special Master explains there is a problem integrating the magnet schools because they are in many cases, effectively neighborhood schools, with students in their attendance area having preference for admission. (SM Recommendation, USP SM Comment [A9].) The District explains that going back to 1978, “the goal of the student assignment plans was to maintain, to the extent possible, the District’s neighborhood school system.” (District Objection (Doc. 1407) at 9.) However, going back to 2005, the Independent Citizens’ Committee (ICC), a citizen committee charged with tracking the desegregation efforts in TUSD, filed a compliance report, which noted that magnet schools were disproportionately minority because magnet schools were disproportionately located west of Alvernon Way where Tucson’s minority populations disproportionately reside. (Mendoza Response Objection (Doc. 1413) at 5; Mendoza Response to Recommendation) This disproportionately limits magnet school opportunities for Latino students who live outside the attendance zone.

The Court realizes that any limit on neighborhood enrollment will raise the charge that Latino students are being denied the opportunity to attend quality magnet programs in their own neighborhoods. As well, the Court realizes that the burden of being transported

1 to school outside your immediate neighborhood is more heavily born by the minority
 2 students in TUSD. The Court believes, however, that both these concerns must be balanced
 3 against the interest of integration for all minority students, which is done by establishing the
 4 50% criteria in the USP and supported by all the Plaintiffs. The Court adopts the
 5 recommendation of the Special Master to retain the 50% criteria, with the understanding that
 6 the Magnet School Plans will take into account the transportation burdens being incurred by
 7 the students, including the distance and time spent traveling to and from school.
 8 Additionally, the District should at last address the issue raised by the ICC in 2005, regarding
 9 the strategic placement of magnet schools in its ongoing efforts under the USP to desegregate
 10 TUSD.

11 **b. § IV: Administrators and Certified Staff**

12 **Comment [A4]: Fisher Plaintiffs object to the Labor Market Study**
 13 **commissioned by the District; Comment [A5]: District objects to financial support**
 14 **requirement in “growing your own” plan.**

15 The Jointly Proposed USP calls for the District to enhance the racial and ethnic
 16 diversity of its administrators and certified staff through its recruitment, hiring, assignment,
 17 promotion, pay, demotion, and dismissal practices and procedures. (Proposed USP (Doc.
 18 1411) § IV(A)(1).) To accomplish this, the USP calls for outreach and recruitment for all
 19 employment vacancies on a nondiscriminatory basis. (Proposed USP (Doc. 1411) §
 20 IV(C)(1).) “The District has hired an outside expert to undertake a Labor Market Analysis
 21 to determine the expected number of African American and Latino administrators and
 22 certificated¹² staff in the District, based on the number of African American and Latino
 23 administrators and certificated staff in the State of Arizona, in a four-state region, a six-state
 24 region and the United States. The Special Master and Plaintiffs shall have until February 1,

25
 26 ¹²“Certificated Staff” refers to personnel who, at minimum, hold a professional
 27 certificate issued by the State and are employed in a position where such certification is
 28 required. (Proposed USP (Doc. 1411), Appendix A: Definitions ¶ 5.)

1 2013 to review the Labor Market Analysis and present any objections to request any
2 additional data or analysis the Parties or the Special Master may deem relevant.” (Proposed
3 USP (Doc. 1411) § IV(C)(2).) In addition to the general objection to the February 1-
4 deadline, the Fisher Plaintiffs challenge the Labor Market Study commissioned by the
5 District and ask that it be set aside, and ask that the Special Master commission a Labor
6 Market Study from an independent source.

7 The Fisher Plaintiffs also object to the District’s reliance on the Labor Market Study
8 to assert that in adopting a “grow your own” program, pursuant to subsection I, Professional
9 Support, the District should not be required to provide financial support to enable current
10 Latino and African American employees to secure the required certifications to become
11 administrators. (Proposed USP (Doc. 1411) § IV(I)(3).) The District argues that the Labor
12 Market Study shows by every possible measurement that the District has more Latino
13 administrators and certificated staff than would be expected, which when combined with the
14 lack of any finding of a constitutional violation and the limited obligations of the 1978
15 Stipulation, does not support a remedy of financial support for Latino and African American
16 employees to secure additional degrees or certifications. (District Objection (Doc. 1407) at
17 12-13.)

18 The District has not sought partial withdrawal of judicial oversight nor requested a
19 partial finding of unitary status in regard to the *Green* factor: administrative and certified
20 staffing. Instead, the District has agreed to undertake efforts to recruit and grow their own
21 African American and Latino administrators and certificated staff. The Court does not
22 consider whether the Labor Market Study supports a finding that vestiges of past
23 discrimination remain in regard to administrative and certified staffing. The Court instead
24 considers whether or not the Labor Market Study is adequate to meet the needs of the USP
25 or if it should be set aside.

1 The Special Master has recommended retaining the language referencing the Labor
2 Market Study in subsection C, Outreach and Recruitment ¶ 2, which the Fisher Plaintiffs find
3 objectionable, because the provisions of the plan are not dependent on the findings of the
4 study though the findings will have an effect on how one assesses the effectiveness of the
5 District's efforts to further recruit African American and Latino professional staff. He
6 submits that it remains to be determined, once the Plaintiffs and he have an opportunity to
7 review the Labor Market Study, whether it is inadequate. (SM Recommendation, USP SM
8 Comment [A10] at 16); (SM Reply to Fisher Response to Recommendation.) The Special
9 Master recommends deleting the language calling for review of the Labor Market Study by
10 February 1, 2013, with the understanding that the parties and he will make any objections to
11 the adequacy of the study when the District submits its recruitment plan. In other words, the
12 Labor Market Study may be evaluated in the context of the proposals being made by the
13 District. *Id.*

14 The Court finds that while preliminary review and comment by the Plaintiffs to the
15 District regarding their opinions regarding the sufficiency of the Labor Market Study, the
16 adequacy of the study cannot be fully determined until it is known how the District uses it,
17 i.e., what conclusions the District draws from it. The Court adopts the Special Master's
18 recommendation to retain the provision allowing the District to assess the effectiveness of
19 its outreach and recruitment plan based on the challenged Labor Market Study and to delete
20 the deadline for review and objections to be made to the study. The Court agrees with the
21 Special Master that review and objections regarding the adequacy of the Labor Market Study
22 are better made at the time the District proposes to rely on it.

23 The Special Master correctly notes that in subsection I, Professional Support ¶ 3, the
24 District is not "required" to provide financial support as part of any "growing your own"
25 method adopted by the District to increase the number of African American and Latino
26 principals, assistant principals, and District Office administrators. The proposed USP
27
28

1 requires the District's "growing your own" plan to include the *possibility* of financial support
2 to enable these employees to receive the required certifications and educational degrees and
3 educational degrees needed for such promotions. *Id.* at 22. The Court adopts this
4 recommendation.

5 **Comment [A6]: District objects to Professional Development including a**
6 **special plan for educators working with ELL students.**

7 The District argues that subsection J, Professional Development, which provides for
8 a training plan to ensure that all staff are provided copies of the USP and trained regarding
9 its elements and requirements, overreaches because ¶ 3(b)(vii) requires the District to
10 develop a district-wide professional development plan for all educators working with English
11 Language Learner (ELL) students. The District argues this is outside the scope of this case
12 because the 1978 Stipulation contained only one obligation with respect to "bilingual"
13 education, and that was to get parental consent before placing a student in a bilingual class.
14 (District Objection (Doc. 1407) at 15.) Even if the Court assumed the bilingual education
15 program in 1978 was the equivalent of today's ELL program, the Court ruled in 2008 that
16 it "would not limit its inquiry to only the express terms of the Settlement Agreement because
17 over the ... 27 years [the Agreement was in place] the parties have interpreted the Settlement
18 Agreement to reach a broad array of programs." (Order (Doc. 1270) at 5.)

19 As noted by the Mendoza Plaintiffs in the 2008 Annual Report that the District
20 prepared to catalogue its activities under the Settlement Agreement it listed: at Cragin, a new
21 program called Avenues described as a language program for ELL students; at Manzo, a new
22 ELL tutoring program; at Maxwell, a "CompEd" program described as after school tutoring
23 for ELL students; at Tully, a focus on all ELL strategies to be implemented in the classroom.
24 (Mendoza Response Objection (Doc. 1413) at 7-8 (citing 2008 Annual Report (Doc. 1266)
25 at Exhibit D).) "Further, and of particular relevance given the District's objection, the
26 Annual Report includes a list of in-service training programs . . . required [] for all District
27
28

1 employees involved in implementing the Agreement. According to the Annual Report, those
2 programs included the following: at Borton, ELL Avenues workshop; SEI endorsement
3 training; ELL summer school training; at Howell, guidelines for grading ELL's; at Roskrige:
4 vocabulary development strategies (ELL strategies) and dual language model (best
5 practices); at Tully, effective reading for ELL's; at Whitmore, math interventions – ELL
6 support.” *Id.* at 8 (citing TUSD 2008 Annual Report (Doc. 1266)).

7 More importantly, in 2008, this Court ruled that student achievement was a relevant
8 measure of effectiveness and reviewed the scores of TUSD students of different racial and
9 ethnic groups on the AIMS test and found:

10 Most troubling are the low achievement rates by [ELL students] on the
11 Arizona Instrument to Measure Standards (AIMS) exam. From 2002
12 through 2004, ELL students failed the reading section of AIMS in grades 3,
13 5, 8, and 10 between 73 and 96%. Anglo student failure rate ranged from 20
14 to 42%. ELL students failed the mathematics section up to 98% as
compared to the highest percentage failure rate of 70% for Anglo students
in the 8th grade. Excluding the 8th grade, the highest percentage failure rate
for Anglo students was 56% in 10th grade math as compared to a 95%
failure rate for the ELL students.

15 *Id.* (citing Order (Doc. 1270) at 54-55) (citations omitted in original).

16 The Court will not limit the USP provisions addressing the needs of ELL students
17 to the bilingual education provision for parental notice contained in the 1978 Stipulation. The
18 Court turns to the District's other reasons for why there should not be a professional
19 development plan for educators working with ELL students.

20 The District explains that it has a Language Acquisition Department that is charged
21 with complying with various statutory obligations and Office of Civil Rights (OCR)
22 agreements related to ELL students. The District asserts that professional development
23 related to ELL students should be handled by the Language Acquisition Department. The
24 District argues that the question of what services should be provided to ELL students is
25 governed by the Equal Educational Opportunities Act and is the subject of another lawsuit,
26 *Horne v. Flores*, 129 S. Ct. 2579 (2009), remanded for further proceedings. (District
27
28

Objection (Doc. 1407) at 15-16.) Finally, the District argues that developing a plan for training educators working with ELL students will encompass all teachers since virtually every educator in TUSD is likely to work with one or more current or recently classified ELL student. (District Response Objection (Doc. 1412) at 11.)

Subsection J(3) provides:

The District shall ensure that all administrators, certificated staff, and paraprofessionals receive ongoing professional development, organized through the director of culturally responsive pedagogy and instruction and the coordinator of professional development, that includes the following elements; 1) The District's prohibitions on discrimination or retaliation on the basis of race and ethnicity; and 2) Practical and research-based strategies in the areas of: (i) classroom and non-classroom expectations; (ii) changes to professional evaluations; (iii) engaging students utilizing culturally responsive pedagogy, including understanding how culturally responsive materials and lessons improve students' academic and subject matter skills by increasing the appeal of the tools of instruction and helping them build analytic capacity; (iv) proactive approaches to student access to ALEs;¹³ (v) [] behavioral and discipline systems, . . . ; (vi) recording, collecting, analyzing, and utilizing data to monitor student academic and behavior progress, including specific training on the inputting and [using]. . . the existing and amended data system; (viii) working with students with diverse needs, including ELL students *and developing a district-wide professional development plan for all educators working with ELL students*; and (viii) providing clear, concrete, . . . strategies for applying tools gained in professional development to classroom and school management, including methods for reaching out to network(s) of identified colleagues, mentors, and professional supporters to assist in thoughtful decision-making; and c) any other training contemplated herein."

(Proposed USP (Doc. 1411) § IV(J)(3).)

The Special Master recommends retaining the challenged ELL language. He argues that culturally responsive pedagogy, approved by all parties, includes how teachers facilitate the learning of ELL students. (SM Recommendation, USP SM Comment [A15] at 24.) "Culturally responsive pedagogy refers to educational approaches and practices which center on the experiences and perspectives of diverse communities; create supportive and inclusive learning environments; utilize learner-centered approaches that emphasize students' cultural

¹³Advanced Learning Experiences, including Gifted and Talented (GATE) programs, Advanced Academic Courses (AACs) and University High School (UHS).

1 assets, backgrounds, social conditions, and individual strengths; and engage families as
2 partners.” (Proposed USP (Doc. 1411), Appendix A: Definitions ¶9.) The District currently
3 invests desegregation funds in ELL programs, and ELL students make up a substantial part
4 of the Latino student body. The provision is not aimed at language acquisition for ELL
5 students. Subsection J is aimed at professional development for teachers and the challenged
6 provision in ¶ 3 is one among many strategies to improve teacher-success. Given the large
7 amount of ELL students in TUSD and their substandard academic achievement, there is a
8 clear need for teachers to learn how to better teach ELL students. (SM Recommendation,
9 USP SM Comment [A15] at 24; see also Mendoza Response Objection (Doc. 1413) at 6-9.)

10 This Court agrees with the Special Master and the Mendoza Plaintiffs. The USP
11 should aggressively address how its ELL students are being taught, i.e., what techniques and
12 approaches teachers might adopt to enhance academic achievement for ELL students. The
13 Court believes the USP presents “the opportunity to have the professionals in the newly
14 created positions of director of culturally responsive pedagogy and instruction and
15 coordinator of professional development join forces to fashion a district-wide professional
16 development plan for all educators working with ELL students.” (Mendoza Response
17 Objection (Doc. 1413) at 6-9.) There is no reason for carving out educators working with
18 ELL students, especially if they are essentially all teachers in TUSD, from the professional
19 development provisions in the USP. There is no reason why professional development
20 related to the USP should be handled by the Language Acquisition Department, outside the
21 auspices of this case. Should there be problems in coordination between the Director of
22 Culturally Responsive Pedagogy and the Language Acquisition Department, waste due to
23 overlap, or any other unforeseeable problems, the District is urged to bring such problems
24 to the attention of the Special Master for resolution.

1 Latino students, including ELL and exceptional (special education students). The Special
2 Master asserts that the goal setting requirement in subsection A(2)(a) addresses this concern,
3 (SM Recommendation, USP SM Comment [21]), but subsection A(2)(a) does not expressly
4 secure the annual setting of goals sought by the Mendoza Plaintiffs. The Court agrees with
5 the Mendoza Plaintiffs that annual goals should be set, but believes the requirement should
6 be included in subsection A(2)(a). The Court does not adopt the language proposed by the
7 Mendoza Plaintiffs. The Special Master shall add language in subsection A(2)(a) to make
8 it clear that developing goals, includes developing annual goals for improving access to ALE
9 programs.

10 **Comment [A11]: District proposes adding language referencing the Governing**
11 **Board's role in approving admission procedures for University High School (UHS).**

12 Subsection A, Access to and Support in Advanced Learning Expectations, includes
13 UHS Admissions and Retention and calls for review and revision of the process and
14 procedure used to select students for admission to UHS. (Proposed USP (Doc. 1411) §
15 V(A)(4).) The District asks that the requirement for it to consult with Plaintiffs and the
16 Special Master during drafting of the revised UHS admission procedures be prior to
17 "adoption by the Governing Board" and implementation of the revised admission procedures.
18 As noted by the Special Master, there is no need to specify the role of the Governing Board
19 in respect to admission and retention procedures for UHS. (SM Recommendation, USP SM
20 Comment [A26].) It goes without saying that many provisions in the USP call for Board
21 approval, and logically the timing for the District to consult with the Plaintiffs and Special
22 Master is prior to submitting an issue to the Governing Board for approval and
23 implementation. Nothing in the USP negates the Governing Board's jurisdiction or
24 responsibilities in regard to UHS or any other school in TUSD.

Comments [8] and [12]: Mendoza Plaintiffs propose adding provisions to require review and monitoring of Exceptional/Special Education placement, including ELL students.

The Mendoza Plaintiffs raise a long held concern, initially raised by the ICC, that the flip-side to under-representation by minority students in ALEs may be over-representation by minority students as special education students. (Mendoza Objection (Doc. 1408) at 5 (citing Order (Doc. 1270), 4/24/2008 at 24-25, 27.) The Government suggests that the Mendoza Plaintiffs' concerns are addressed in subsection E, Maintaining Inclusive Environments, ¶ 1, which requires the District to not assign students to classrooms or services in a manner that impedes desegregation. As noted by the Special Master, the Government may read this section as applying to special education, but others may not. (Reply to DOJ Response to Recommendation.)

The Mendoza Plaintiffs' concern that minority students are over-represented in special education classes is not limited to preventing segregation. As the Court understands it, the Mendoza Plaintiffs are concerned that these students may be incorrectly perceived and treated as special need students and, therefore, placed unnecessarily in exceptional (special) education classes. This affects student achievement, which is a quality of education concern. The Court adopts the Special Master's recommendation to include an additional subsection in Section V, as follows:

The District shall review its referral, evaluation and placement policies and practices on an annual basis to ensure that African American and Latino students, including ELL students, are not being inappropriately referred, evaluated or placed in exceptional (special) education classes or programs.

(SM Recommendation, SM USP Comment [A28] at 31; Proposed USP (Doc. 1411) at Comment [A12].)

In an effort to address special data collection and reporting needs related to assessing whether there is over-representation of minority students in exceptional (special) education classes, the Mendoza Plaintiffs suggest adding "special education/exceptional education

status” as an assessment criteria under subsection A(2)(b), which covers ALE program assessments. (Proposed USP (Doc. 1411) at Comment [A8].) The Court believes, however, that the data and reporting criteria suggested by the Mendoza Plaintiffs is better addressed under the new subsection. The Court adopts the language proposed by the Mendoza Plaintiffs, with the following addition: “The District shall develop appropriate criteria for data gathering and reporting to enable it to conduct meaningful review of ‘its referral, evaluation and placement policies and practices on an annual basis to ensure that African American and Latino students,’” The Court adopts the recommendation of the Special Master to retain the language in Section V(A)(2)(b), without adding “special education/exceptional education status” as an ALE assessment criteria. (SM Recommendation, SM USP Comment [A19] at 27.)

Comment [A13]: Mendoza request for the USP to set an overall goal of raising graduation rates to at least 88% of average graduation rate.

Subsection D, Student Engagement and Support, is aimed at improving academic achievement by using strategies to close the achievement gap and eliminate other racial and ethnic disparities found in TUSD. (Proposed USP (Doc. 1411) § V(D)(1).) This subsection contains a provision for an Academic and Behavioral Supports Assessment and Plan, *id.* at D(2), which identifies strategies including in part: Dropout Prevention and Retention Plan, *id.* at (2)(i), Professional Development, *id.* at (5), Engaging Latino and African American Students, *id.* at (6), Services to Support African American Student Achievement, *id.* at (7), and Services to Support Latino Student Achievement, *id.* at (8).

The Mendoza Plaintiffs believe that, given the urgency of improving minority graduation rates, the USP does not go far enough when it only requires the District to “develop yearly goals for lowering dropout rates, increasing graduation rates, and reducing retentions in grade for African American and Latino students, including ELLs in each

highschool.” (Mendoza Objection (Doc. 1408) at 3 (citing Proposed USP (Doc. 1406) at §V()C(2)(c)(i).)

As the Court held above in respect to the Fisher Plaintiffs’ request for specific goals to be set for increasing ALE access and retention: “Because the Court accepts the Special Master’s recommendation that the USP utilize the “expectancy theory of motivation” in respect to goal setting, the Court adopts the language proposed by the majority of the parties, over the [Mendoza] Plaintiffs’ objection. (SM Recommendation, USP SM Comment [A17] at 26.) This does not foreclose the [Mendoza] Plaintiffs from reurging the Court to adopt specific goals in the future should they believe that goals set pursuant to the expectancy theory of motivation are inadequate.”

Comment [15],[16] and [17]:Fisher Plaintiffs assert academic interventions are insufficient to close the achievement gap between White and African American students, the USP should provide for the African American Student Support Services Department (SSAASA) to be a separately funded, staffed, and organized entity, and the USP should establish an African American Academic Achievement Task Force (AAAATF).

Subsection D includes Services to Support African American Student Achievement, (Proposed USP (Doc. 1411) § V(D)(7), which mirrors Services to Support Latino Student Achievement, *id.* at D(8).

The Fisher Plaintiffs correctly point out that the USP must address the vestiges of the, *de jure*, Black and White dual school system operated by the District. They ask for the establishment of an African American Academic Achievement Task Force (AAAATF) to provide input and contribute to the development of a curricular intervention plan specifically designed to improve the academic achievement of the District’s African American students. The Fisher Plaintiff’s ask this Court to ensure separate funding and administration for SSAASA because in a budgetary crisis the District might “zero fund” the ethnic studies

1 departments, “where one department’s funding gain would be another’s loss.” (Fisher’s
2 Response Objection (Doc. 1415) at 12.) The Court understands the Fisher Plaintiffs’ concern
3 that SSAASA remain independent and autonomous; the hugely disproportionate numbers
4 between African American and Latino students creates a potential that Services to Support
5 Latino Student Achievement may overwhelm Services to Support African American Student
6 Achievement by sheer volume.

7 The Special Master reflects that the Fisher Plaintiffs’ request for separate funding,
8 staffing and organizational structure is contrary to Section 1(D)(7) of the USP, which grants
9 the Superintendent the authority to organize units, functions and determine line of authority
10 within the District and will discourage collaborative work of student support personnel. (SM
11 Recommendation, USP Comment [A36].) The Superintendent’s authority to establish
12 organizational relationships and lines of responsibility for various offices and positions
13 provided for in this Order is, however, limited by this Court’s directive that the two plans not
14 be merged into one for organizational or budgetary purposes. The Court notes that as of
15 now, the USP calls for the appointment of a Director of Support Services for African
16 American Student Achievement, (Proposed USP (Doc. 1411) § V(D)(4)(a)), and a Director
17 of Support Services for Latino Student Achievement, *id.* (4)(b). The Court does not preclude
18 the collaborative work of student support personnel, but directs the Special Master to ensure
19 that there are clear lines for tracking and distinguishing between funding and services to
20 support academic achievement for African American and Latino students.

21 The District objects to the creation of a special task force aimed solely at improving
22 academic achievement for African American students. The District complains that the
23 proposed AAAATF will be costly and is unnecessary. The District would have to pay any
24 expert serving on the AAAATF and extra-duty pay to teachers or other TUSD staff serving
25 on the AAAATF.

1 The Special Master points out that the average academic achievement levels and
 2 graduation rates of African American students in TUSD are substantially lower than White,
 3 Asian American and Latino students. “Moreover, in recent years Latino students have made
 4 steady, if modest, progress on state assessments of reading and math while African American
 5 students have not [].” (SM Recommendation, SM USP, Addendum C, at 67.)

6 The Court finds that given the unique needs of the African American students, which
 7 are distinct from those of the Mendoza Plaintiffs, the AAAATF is warranted, especially on
 8 the limited basis proposed by the Fisher Plaintiffs and the Special Master. The AAAATF
 9 will be convened immediately and tender its report by June 1, 2013. The USP calls for the
 10 AAAATF to consult with prominent experts, and the Special Master advises that the number
 11 of experts would be no more than three. The Court believes that expert fees for consultations
 12 will be less than if the experts actually served on the AAAATF. The Court approves creation
 13 of the AAAATF, including allowing it to consult with prominent experts who can identify
 14 research-based practices that have been shown to enhance the learning outcomes of African
 15 American students.

16 The Court adopts the recommendation of the Special Master to include the provision
 17 in the USP for the AAAATF. (SM Recommendation, USP Comment [A38].

18 **Comment [18]: Mendoza Plaintiffs ask for reporting provisions to address**
 19 **exceptional (special) education services.**

20 Because the Court adopted the Mendoza Plaintiffs’ proposed addition to review and
 21 monitor exceptional (special) education placement, the Court adopts the recommendation of
 22 the Special Master to include an additional paragraph in subsection F, Reporting, as follows:

- 23 u. A report setting forth the number and percentage of students receiving
 24 exceptional (special) education services by area of service/disability,
 25 school, grade, type of service (self-contained , resource, inclusion, etc.),
 26 ELL status, race and ethnicity.

1 (SM Recommendation, USP SM Comment [40]); (Proposed USP (Doc. 1411) at Comment
2 [A8].)

3 **d. § VI: Discipline**

4 The USP requires the District to reduce racial and ethnic disparities in the
5 administration of school discipline. Mendoza Plaintiffs request that this reduction be done
6 “with particular focus on materially reducing the relative rate at which African American and
7 Latino students experience in-school and out-of-school suspension as compared to the
8 District’s White students.” (Proposed USP (Doc. 1411) at Comment [A19].)

9 The Special Master finds the USP requires the District to understand and address the
10 clear racial disparities in the number and proportion of disciplinary actions in TUSD. The
11 Court agrees. It goes without saying that the USP requires what the Mendoza Plaintiffs seek.
12 The Court adopts the Special Master’s recommendation to retain the language as proposed
13 in the USP. (SM Recommendation, SM USP, Comment [A43] at 43.)

14 **e. § VIII: Extracurricular Activities**

15 The Court adopts the Special Master’s recommendation to change Subsection A(3)
16 “tutoring” to “science club or Junior Achievement” because tutoring is not typically an
17 extracurricular activity. (SM Recommendation, USP Comment [A44] at 51.) The same
18 change should be reflected in Subsection B(1). The Special Master shall, however, ensure
19 that to the extent students seek to voluntarily participate in after school tutoring to improve
20 their academic standing, equitable access should be provided for tutoring– especially for
21 students who attend schools outside their neighborhoods. The Court leaves it to the
22 discretion of the Special Master to ensure the placement of such a requirement in the USP.
23
24
25
26
27
28

1 **f. § X: Accountability and Transparency**

2 **Comment [A20]: The District seeks to shorten the review time for the budget**
3 **due to statutory deadlines for Governing Board approval.**

4 The USP calls for certain specified numbers of days for Plaintiffs and the Special
5 Master to review and comment on the District's proposed budget plan, and the District seeks
6 to shorten the time frames. The Court adopts the Special Master's recommendation to accept
7 the District's proposed review and comment schedule. The Court defers to the Special
8 Master's expertise in regard to his suggestion that the budgetary plan called for in subsection
9 B, Budget, should be the "USP Expenditure Plan" instead of the "Desegregation Funds USP
10 Plan." (SM Recommendation, USP Comment [A45, A48] at 55.)

11 **Comment [A24]: The District objects to a provision allowing the Special Master**
12 **to select an Implementation Committee of three experts.**

13 Subsection E, Role of Special Master and Plaintiffs, establishes the Special Master's
14 oversight responsibilities, as delegated in the January 6, 2012, Order Appointing Special
15 Master. (Proposed USP (Doc. 1411) § X(E)(1).) Also, pursuant to the January 6, 2012,
16 Order, the USP authorizes the Special Master to select an Implementation Committee of three
17 independent expert advisors to aid him in monitoring and overseeing implementation of the
18 USP. *Id.* at E(2). Recognizing that the January 6, 2012, Order provided for the Special
19 Master to request extraordinary assistance as he deems it necessary, the District objects to
20 including this provision in the USP. The District argues that the January 6 Order should
21 govern, which provides for the parties to object to any such proposal by the Special Master.
22 (District Objection at 24.)

23 It appears to the Court that the Special Master deems it necessary to request
24 extraordinary assistance of nationally prominent experts on an on-going, though very part-
25 time limited basis. The District has filed an objection.

1 The Special Master argues that these experts will provide the District, the Plaintiffs,
2 and the Special Master, access to exceptionally knowledgeable individuals, who can advise
3 and guide the ongoing process of implementing and overseeing the USP. He believes that
4 the exceptional quality of the proposed USP is due to the participation of the several experts
5 utilized by the Special Master. The Court has found the Special Master's judgment to be
6 sound and conscientious in this regard. The Court notes that the road ahead involves the
7 development of a financial feasibility plan for implementing the USP, which in many ways
8 may be even more difficult than drafting the USP. The Court advises that the three experts
9 proposed by the Special Master should be able to do double duty in regard to the District's
10 ongoing efforts to develop the financial feasibility plan and on the AAAATF. The parties
11 may file objections with the Court to the individuals proposed by the Special Master or to
12 proposed compensation for those individuals. (Proposed USP (Doc. 1411) § X(E)(2)).

13 The Court adopts the recommendation of the Special Master and retains this
14 language. (SM Recommendation, SM USP Comment [A52] at 58.)

15 **D. § XI: Final Termination**

16 The USP calls for a motion for determination of complete unitary status to not be
17 filed prior to the end of 2016-2017 school year. The Fisher Plaintiffs argue this is only three-
18 and-a-half-years and ask for an end-of-the-school-year 2017-2018 deadline. (Proposed USP
19 (Doc. 1411) Comment [A25].) The school year ends in May. Consequently, there is only
20 a half a year remaining for the 2012-13 school year. Under the USP, there remain four full
21 school years. The Court adopts the Special Master's recommendation to retain the 2016-
22 2017 deadline for attaining unitary status. (SM Recommendation, USP Comment [A55].)

1 **E. Conclusion**

2 The Court adopts the USP, pursuant to the parties' stipulations and pending
3 incorporation of the changes required by the rulings of this Court resolving the disputed areas
4 of the consent decree.

5 **Accordingly,**

6 **IT IS ORDERED** that the Second Motion for Reconsideration (Doc. 1418) is
7 DENIED.

8 **IT IS FURTHER ORDERED** that the State shall show good cause within 14 days
9 of the filing date of this Order as to why its status as *amici* should not be concluded and why
10 the normal avenues of review will not serve to protect the State's interests in the future. The
11 parties and the Special Master may file responses to the State's showing, and the State may
12 file a Reply.

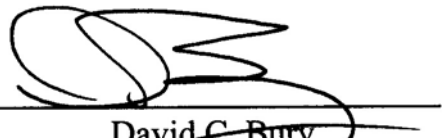
13 **IT IS FURTHER ORDERED** that the Court adopts all elements of the USP
14 stipulated to by the parties (Stipulation Doc. 1411) and orders the disputed parts to be
15 revised, pursuant to the rulings of this Court made herein.

16 **IT IS FURTHER ORDERED** that the Special Master shall oversee the revision of
17 the USP, and the District shall file the USP with the Court, within 10 days of the filing date
18 of this Order.

19 **IT IS FURTHER ORDERED** that the Special Master's Recommendation and all
20 attachments shall be filed into the record by the Clerk of the Court.

21 DATED this 6th day of February, 2013.

22
23
24
25
26
27
28



David C. Bury
United States District Judge